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Hearing:
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LKM

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ferris Corporation

Serial No. 74/654,765

Lynn A. Sullivan and Anne E. Naffziger of Leydig, Voit & Mayer, Ltd., for applicant.

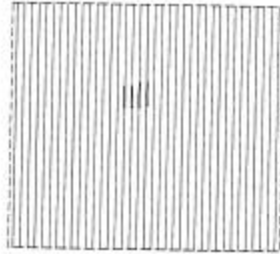
Teresa Rupp, Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney)

Before Chapman, Rogers and McLeod, Administrative Trademark Judges.

Opinion by McLeod, Administrative Trademark Judge:

An application has been filed by the Ferris Corporation to register the color "pink," as shown below, for "surgical and post-surgical wound dressings for use in covering and packing incisions and wounds; wound dressings for dermal ulcers, pressure sores, decubitous and vascular ulcers" in International Class 5. The following description of the mark is in the record: "The mark consists of the color pink as used on wound dressings." The following lining statement is also in the record: "The drawing is lined for the color pink. The

matter shown on the drawing by dotted lines is not a part of the mark and serves only to show the position of the mark."¹



A final refusal of registration on the Principal Register, and of applicant's alternative request for registration on the Supplemental Register, has been issued on the ground that the asserted mark is de jure functional.² See Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. Sections 1051, 1052 and 1127; Section 23 of the Trademark Act, 15 U.S.C. Section 1063. Registration has also been refused on the ground that the proposed mark is not inherently distinctive, and that applicant has not demonstrated acquired distinctiveness. See Sections 1, 2 and 45 of the Trademark

¹ Application Serial No. 74/654,765, filed March 30, 1995, alleging a date of first use of September 1988, and first use in commerce of February 1989.

² On October 30, 1998, the Trademark Act was amended to list functionality as a specific ground for refusal. See Section 2(e)(5), "comprises any matter that, as a whole, is functional." Although the amendment does not affect our analysis herein, because the statute was amended after the application was initially examined, we have referred to the statutory ground for refusal as indicated by the Examining Attorney.

Act, 15 U.S.C. Sections 1051, 1052 and 1127; Section 2(f) of the Trademark Act, 15 U.S.C. Section 1052(f).³

Applicant has appealed, and this case has been fully briefed. An oral hearing was held.

DE JURE FUNCTIONALITY

The Examining Attorney argues that the color "pink" is de jure functional for surgical wound dressings because it is compatible with human skin color. In particular, the Examining Attorney contends that the color pink, or "pinkish cream" as shown on applicant's specimens, is equivalent to "flesh color." The Examining Attorney concludes that there is a competitive need for others in the field to use the color pink for surgical wound dressings. The Examining Attorney asserts, among other things, that applicant should not be allowed to gain an unfair competitive advantage by appropriating a color that blends well with human skin.

In support of her position, the Examining Attorney has submitted a dictionary definition of the term "flesh color" to mean "the color of a white person's skin: yellowish pink; pinkish cream." *Random House Unabridged Dictionary* 733 (2nd

³ Applicant explicitly amended its application to one under Section 2(f) and does not contend that the asserted mark is inherently distinctive.

ed. 1993). She also submitted articles from the NEXIS computer database, examples of which read as follows:

A company called Multiskins is now producing a line of bandages in light, medium and dark brown. Explains Multiskins president Mitch Eisenberg: "People shouldn't be forced to wear someone else's skin tone on them. It stands out like a sore thumb. No one should have to wear a pink bandage when your skin isn't pink." The target market for the bandages is African-American women, although Mr. Eisenberg says that Hispanics and Asians can also wear the lightest shade. *F!D FAX*, The Dallas Morning News, October 6, 1993, at 2E;

"People of color were wearing pink-colored bandages. It made no sense." Thus was born Multiskins, an adhesive bandage for African-Americans. Eisenberg, a lawyer and entrepreneur, concluded that the traditional Caucasian-hued adhesive strip made little sense for nonwhites. *Bandages Try to Keep Everyone Covered*, Newsday, November 8, 1993, at 37; and

The treated area will feel as though it were burned, and will look like a blister with the top removed. Again, simple wound care is necessary to prevent scabbing and promote the growth of new, pink skin. *Lasers for Skin Surgery*, Harvard's Women's Health Watch, March 1, 1997, Vol. 4.

Applicant takes the opposite position. Applicant argues that the color "pink" is unique in the field of surgical wound dressings. According to applicant, competitors do not use "pink," but rather use "white" for sterilization purposes or "flesh/beige color" to blend into skin. (Applicant's Brief at 6, 7 and 8). Applicant submits that there are a number of

alternative colors available for competitors, and that applicant's color "pink" does not blend with any skin color. Applicant maintains that its product literature does not tout any utilitarian or functional purpose of the color "pink." Applicant argues that its surgical wound dressings are not sold over-the-counter, and thus the Examining Attorney's evidence concerning other "bandages" is irrelevant. According to applicant, the record is devoid of any evidence that the relevant competitors use the color "pink."

In support of its position, applicant submitted sample wound dressings. Applicant also submitted copies of advertising and promotional materials concerning its applied-for mark. In addition, applicant attached pages from a medical supply catalog which show wound care items, including adhesive bandages, tapes and surgical wound dressings. Applicant also submitted various items of evidence in support of its claim of acquired distinctiveness.

Color alone is registrable as a trademark if it is not de jure functional and if it has acquired distinctiveness in connection with the identified goods. *See Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 146 L.Ed.2d 182, 120 S.Ct. 1339, 54 USPQ2d 1065 (2000), *citing Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 34 USPQ2d 1161 (1995); *Brunswick Corp. v. British Seagull Ltd.*, 35 F.2d 1527, 32

USPQ2d 1120 (Fed. Cir. 1994), *cert. denied*, 115 S.Ct. 1426 (1995); and *Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417 (Fed. Cir. 1985). A color is de jure functional "if it is essential to the use or purpose of the article or if it affects the cost or quality of the article." *Qualitex*, 514 U.S. at 164, 34 USPQ2d at 1163, *citing Inwood Lab., Inc. v. Ives Lab., Inc.*, 456 U.S. 844, 850 n.10 (1982). The critical inquiry in these cases is whether exclusive use of the color would put competitors at a significant disadvantage. *Qualitex*, 514 U.S. at 165, 34 USPQ2d at 1164.

When determining whether a color is de jure functional, courts (including our primary reviewing court - the U.S. Court of Appeals for the Federal Circuit) have considered factors including (i) whether the color serves a non-trademark purpose; (ii) whether that purpose is important to consumers; (iii) whether the color is the best, or at least one, of the few superior colors available for that purpose; (iv) whether competitors are using the color for that purpose; and (v) whether there are alternative colors available for similar uses by others. *Qualitex*, 514 U.S. at 168, 34 USPQ2d at 1164; *Brunswick*, 35 F.2d at 1532, 32 USPQ2d at 1122, *quoting In re Bose Corp.*, 772 F.2d 866, 872, 227 USPQ 1, 6 (Fed. Cir. 1985).

There is no question that "flesh color" for wound dressings serves the utilitarian purpose of blending well with

the natural color of human skin. Applicant has consistently acknowledged this fact throughout the examination and appeal process. Indeed, applicant admits that "flesh colored" wound dressings are predominant in applicant's industry:

Predominant in the industry are white and flesh/beige colored wound dressings which do serve a utilitarian purpose....Wound dressings are typically white in color for economy and sterility purposes. Some manufacturers, however, produce flesh colored wound dressings to blend with the natural color of skin... Exhibit 1 shows competitors' wound dressings which are typically white, creme or flesh colored... (Applicant's Response, February 20, 1996, p. 2);

In fact, the typical wound dressing is either white in color to suggest sterility, or flesh/beige to blend with the natural skin tones.... (Applicant's Response, February 20, 1996, p. 4);

Applicant urges the Examiner to view the samples submitted herein (see Exhibit B) to see the differences of the pink color of Applicant's products as compared to traditional flesh colored and creme-colored wound dressings, pictures of which were submitted as catalog pages attached to Applicant's prior Response. (Applicant's Response, September 27, 1996, p. 4);

As Exhibit B to Applicant's Response to the March 29, 1996, Office Action shows, flesh colored bandages are very different from Applicant's pink wound dressings. Applicant attaches another specimen as Exhibit A hereto to show that its color pink is not similar to "flesh" colored bandages. (Applicant's Response, October 2, 1997, p. 6); and

Applicant's color is not the preferred color because, first, for sterility reasons white would be and is the typical and functional color of the competitors. Second, pink does not blend into the skin as a beige or flesh colored bandage would. (Applicant's Brief, March 11, 1999, p. 6).

In addition, applicant submitted excerpts from an industry catalog which, according to applicant, show "competitors' wound dressings which are typically white, creme or flesh colored..." (Applicant's Response, February 20, 1996, p. 2). The catalog includes color photographs and descriptions of various "flesh colored" wound dressings from a number of different competitors, such as Coverlet Adhesive Dressings, Active Strips Flexible Foam Bandages, Allevyn Island Dressing, and Ultec Hydrocolloid Dressings.

Having established that "flesh colored" wound dressings serve an important purpose for users and are sold by applicant's competitors, we must decide whether applicant's color "pink," as shown on the specimens of record, is a "flesh color." *In re ECCS*, 39 USPQ2d 2001, 2004 (Fed. Cir. 1996). We conclude that it is. As noted by the Examining Attorney, "flesh color" is defined as "the color of a white person's skin: yellowish pink; pinkish cream." *Random House Unabridged Dictionary, supra*. The Examining Attorney has presented excerpts from NEXIS articles which support the conclusion that

the color "pink" is synonymous with "flesh color" and used to describe the natural color of skin. In particular, the NEXIS articles discuss "pink skin" and "pink-colored bandages" for Caucasian skin tones.⁴

Moreover, the Maerz and Paul *Dictionary of Color* 157 (1950), and the National Bureau of Standards *Color, Universal Language and Dictionary of Names* 41-42 (1976), set forth a range of colors defined as "flesh color" and "flesh pink."⁵ These colors include "moderate pink," "light yellowish pink", "moderate yellowish pink", "pale yellowish pink", and "brownish pink." Like their verbal descriptions, all of the corresponding "flesh color" plates reproduced in the color dictionaries represent variations of the color "pink."⁶

⁴ Applicant contends that the Examining Attorney improperly compared applicant's surgical wound dressings to over-the-counter bandages. Applicant also argues that the relevant consumers are hospitals and medical personnel, rather than ordinary consumers. We have considered applicant's arguments, but find them unpersuasive for two reasons. First, the Examining Attorney's evidence concerning over-the-counter bandages is relevant to the extent that it shows that "flesh colored" wound dressings are important to those who wear them. Second, we recognize that applicant's products are generally sold to clinics, hospitals and medical personnel. However, the ultimate users of these products are ordinary consumers, and their interests obviously play a role in competition.

⁵ The Board may take judicial notice of dictionary definitions. See *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁶ The authors of *The Dictionary of Color* acknowledge that it is difficult to say what type of complexion "flesh color" or "flesh pink" is to represent. *The Dictionary of Color* 157. Consequently, the "flesh colors" defined in the dictionary and shown on the color plates vary to a limited extent.

It is our opinion that applicant's color "pink" is the same as or closely resembles the limited range of "flesh colors" defined by authorities and used by competitors. In reaching this decision, we have compared applicant's specimens of record (the color of the actual wound dressing) and the color shown in applicant's advertisements to the "flesh colored" wound dressings shown in the industry catalog excerpts submitted by applicant. We have also compared the color "pink" shown on the specimens to the "flesh color" plates reproduced in the color dictionaries. It is true that there is no evidence in the record that competitors use the exact color or shade of "pink" shown on applicant's specimens for surgical wound dressings. However, the fact that applicant may be the first and only user of this exact color "pink," or that applicant intended the color to serve as a trademark does not justify registration of a de jure functional color.⁷ See *In re Water Gremlin Co.*, 635 F.2d 835, 208 USPQ 89 (CCPA 1980).

⁷ As noted by the Examining Attorney, and acknowledged by applicant, the color "pink" on the various specimens applicant submitted during prosecution differs from one specimen to the next. According to applicant, the color variation is attributable to the sterilization process, which may alter the shade of pink. Applicant states, however, that it only sells sterilized wound dressings, and that a slightly brighter shade of pink indicates that the product has not yet been sterilized. (Applicant's Brief at 9).

We have also considered applicant's argument that its color "pink" does not blend well with the natural color of human skin, and that there are alternative colors available. On this point, we note that none of the "flesh colored" wound dressings used by competitors is a perfect match for human skin tone. In our opinion, however, applicant's color "pink" matches human skin color just as well as, or perhaps better than, the "flesh colored" wound dressings used by applicant's competitors.

While a limited number of alternative "flesh colors" are available to competitors, this fact does not persuade us of a different result. The Board addressed a similar argument in *British Seagull Ltd. v. Brunswick Corp.*, 28 USPQ2d 1197 (TTAB 1993), *aff'd* 35 F.3d 1527, 32 USPQ2d 1120 (Fed. Cir. 1994). In that case, the Board found that the color "black" for outboard engines was de jure functional because it was compatible with a wide variety of boat colors and made objects appear smaller. *Id.* at 1200. The Board also noted, in particular, that there was a competitive need for the color "black" since other manufacturers used "black" and "other similar colors" for these types of products. *Id.* at 1199-1200. The Board concluded that "to limit [competitors] options by allowing applicant exclusive appropriation of one of the most marketable colors would be unfair." *Id.*

The same analysis is applicable to this case. As noted above, applicant's color "pink" closely resembles the few other "flesh colors" that are used by competitors. In our view, the applied-for color "pink" is one of the best or at least one of the few superior "flesh colors" available for wound dressings. Under the circumstances, applicant should not be permitted to appropriate exclusively a color "pink" which blends well with (primarily Caucasian) skin tone. To do so would limit the options of competitors and preclude them from using similar "flesh colors" on their products.

Accordingly, we find that applicant's applied-for mark is de jure functional.

ACQUIRED DISTINCTIVENESS

Applicant argues that the mark has acquired distinctiveness. However, "evidence of acquired distinctiveness is of no avail to counter a de jure functionality rejection." *Brunswick*, 35 F.3d at 1532, 32 USPQ2d at 1124, citing *In re R.M. Smith, Inc.*, 734 F.2d 1482, 1484, 222 USPQ 1, 3 (Fed. Cir. 1985). We have found that the applied-for mark is de jure functional. However, for completeness of the record, we will now consider the evidence of acquired distinctiveness.

Applicant carries the burden of proving a prima facie case of acquired distinctiveness. *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 1576, 6 USPQ2d 1001, 1004 (Fed. Cir. 1988), *citing Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1405, 222 USPQ 939, 942 (Fed. Cir. 1984). There is no fixed rule for the amount of proof necessary to demonstrate acquired distinctiveness. Nevertheless, we believe that the burden is heavier in this case because of the inherent non-distinctive nature of the applied-for mark. It is our view that consumers do not associate a single color of a product with a particular manufacturer as readily as they do a trademark or product packaging trade dress. *See Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 146 L.Ed.2d 182, 120 S.Ct. 133, 54 USPQ2d 1064; *Yamaha*, 840 F.2d at 1581, 6 USPQ2d at 1008 (evidence required to show acquired distinctiveness is directly proportional to the degree of non-distinctiveness of the mark at issue); *see also EFS Mktg., Inc. v. Russ Berrie & Co.*, 76 F.3d 487, 491, 37 USPQ2d 1646, 1649 (2d Cir. 1996)("[C]onsumers do not associate the design of a product with a particular manufacturer as readily as they do a trademark or product packaging trade dress."); *In re Sandberg & Sikorski Diamond Corp.*, 42 USPQ2d 1544, 1548 (TTAB 1996)("In view of the ordinary nature of these designs and the common use of gems in descending order of size on rings, applicant

has a heavy burden to establish that its configuration designs have acquired distinctiveness and would not be regarded merely as an ordinary arrangement of gems.").

Applicant relies upon the affidavit of Mr. Roy Carr, manager of Ferris Corp., who attests that applicant has been using the applied-for mark in interstate commerce since 1989. According to Mr. Carr, applicant has expended more than \$1 million in direct advertising and promotional costs for goods bearing the "pink" color trademark, and applicant has earned \$10 million in sales revenues for the years 1989-95. (Carr Decl. ¶¶ 3-4). Applicant also submitted 145 customer letters and sample advertisements.

We agree with the Examining Attorney that applicant's showing is insufficient to establish acquired distinctiveness. Although the sales and advertising figures are not insignificant, given the fact that the applied-for mark is merely a single color, and further that very similar colors have been used by competitors for wound dressings, this evidence does not rise to the level necessary to support a finding of acquired distinctiveness in this case. We cannot conclude from these figures that consumers recognize the "pink" colored wound dressings as indicating origin with applicant. See *In re Bongrain Int'l (American) Corp.*, 894 F.2d 1316, 1318, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990)(growth

in sales may be indicative of popularity of product itself rather than recognition as denoting origin).

We would also point out that the sales and advertising figures in this case are less compelling than amounts presented in a number of other cases where acquired distinctiveness has not been found. See *Braun Inc. v. Dynamics Corp.*, 975 F.2d 815, 827, 24 USPQ2d 1121, 1133 (Fed. Cir. 1992)(\$5,500,000 advertising blender trade dress insufficient to establish acquired distinctiveness); *British Seagull*, 28 USPQ2d 1197 (\$100 hundred million dollars advertising "black" outboard engines and \$3 billion dollars sales insufficient); *Goodyear Tire & Rubber Co. v. Interco Tire Corp.*, 49 USPQ2d 1705 (TTAB 1998)(\$56,000,000 sales revenues and 740,000 tires sold insufficient to show acquired distinctiveness of tire tread design). Applicant does not come close to meeting the substantial level of sales and advertising we conclude is required to establish acquired distinctiveness in this case.

As for direct evidence of acquired distinctiveness, applicant relies upon approximately 145 form letters, which read in part:

I have been involved with wound care for over ____ years. When I see the color "pink" on wound dressings, I associate that with the Ferris *PolyMem*® wound care products. Because of Ferris advertising and promotion of "The Pink Dressing" I naturally assume pink wound dressings come from Ferris.

The form letters are problematic for a few reasons. First, some of the letters are incomplete.⁸ Second, the form language is somewhat ambiguous. The Board is unable to determine whether the declarants truly understood that the color "pink," as shown on the specimens of record, represents applicant's applied-for mark. Furthermore, it is unclear whether the declarants associate the color "pink" with applicant because of applicant's use and advertising of the color on the goods or whether they are simply familiar with applicant's promotion of its registered word mark "The Pink Dressing."

Finally, with respect to applicant's length of use, given the nature of the involved mark (i.e., a single color applied over the entire product which is very similar to colors used by competitors), we are unable to conclude that consumers have come to recognize applicant's color "pink" as an indication of source based upon this length of use.

⁸ Indeed, the incomplete nature of some of the letters casts doubt on whether the forms were read carefully before being signed.

Accordingly, after careful consideration of the entire record, we find that applicant has failed to establish that the color "pink" has acquired distinctiveness within the meaning of Section 2(f). *See West Florida Seafood, Inc. v. Jet Restaurants, Inc.*, 31 F.3d 1122, 31 USPQ2d 1660 (Fed. Cir. 1994).

Decision: The refusal of registration on the Principal Register and on the Supplemental Register on the ground that the color "pink" is de jure functional is affirmed. The refusal of registration on the basis that the color "pink" has not been shown to have acquired distinctiveness is affirmed.

B. A. Chapman

G. F. Rogers

L. K. McLeod
Administrative Trademark
Judges, Trademark
Trial and Appeal Board